Supreme Court, U.S.
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No. 03-542

IN THE

Supreme Court of the United States

JULIO ARANA,

Petitioner,

v.

OCHSNER HEALTH PLAN, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the unanimous *en banc* United States Court of Appeals for the Fifth Circuit correctly held that a claim for declaratory relief brought by an ERISA plan member, seeking interpretation of the plan in light of an arguably saved statute, was subject to federal jurisdiction pursuant to ERISA § 502(a)(1)(B).

STATEMENT PURSUANT TO RULE 29.6

Ochsner Health Plan, Inc. is wholly owned by Ochsner Clinic Foundation.

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STATEMENT OF THE CASE

Although the factual statement and procedural history provided by Julio Arana are generally accurate, the picture they paint derives from key omissions of relevant facts. That history contains two deficiencies—(a) it inadequately states the basis for the unanimous Fifth Circuit decision holding that Mr. Arana's claim properly fell under ERISA § 502(a)(1)(B), thus creating the impression that the Fifth Circuit resolved this case on § 502(a)(3) grounds when it expressly refused to address that question, and; (b) it fails to disclose that $150,000 in settlement proceeds paid to Mr. Arana have been retained in trust for him by his attorney. The confluence of these two material facts demonstrates that the instant *Petition* presents no issue worthy of certiorari under either ERISA § 502(a)(1)(B) or § 502(a)(3).

The only issue now before the Court is whether the federal courts possess jurisdiction under ERISA § 502(a)(1)(B) to hear a claim brought by Mr. Arana for a declaration that Louisiana Revised Statute 22:663 precludes OHP from paying health benefits to Mr. Arana and then seeking subrogation or reimbursement of those expenses from settlement proceeds retained by Mr. Arana. The Fifth Circuit observed that this claim "requests a declaratory judgment 'requiring OHP to release its notice of lien and to withdraw and release OHP's subrogation, reimbursement and assignment claims' because such claims violate La. R.S. 22:663." *Appendix of Julio Arana* 8. Using this as the sole basis upon which to analyze its jurisdiction, the Fifth Circuit held that such a claim constituted either a clarification of rights under an ERISA plan or a claim for benefits:

> Arana's La. Rev. Stat. § 22:663 claim can fairly be characterized either as a claim "to recover

> benefits due to him under the terms of his plan" or as a claim "to enforce his rights under the terms of the plan." As it stands, Arana's benefits are under something of a cloud, for OHP is asserting a right to be reimbursed for the benefits it has paid for his account. It could be said, then, that although the benefits have already been paid, Arana has not fully "recovered" them because he has not obtained the benefits free and clear of OHP's claims. Alternatively, one could say that Arana seeks to enforce his rights under the terms of the plan, for he seeks to determine his entitlement to retain the benefits based on the terms of the plan.

Id. at 438 (footnote omitted). The court then followed substantial precedent holding that similar claims fell under § 502(a)(1)(B) and could therefore be adjudicated in federal court.[1]

The Fifth Circuit never reached the § 502(a)(3) issue raised by Mr. Arana's *Petition for Certiorari* because that issue was not necessary to the disposition of this case. Indeed, the Fifth Circuit expressly reserved that issue for another day.[2] After holding that a claim seeking the interpretation of

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1. *Id.* at n.8 (citing *Clancy v. Employers Health Ins. Co.*, 82 F. Supp. 2d 589, 591-92, 596 (E.D.La.1999), *aff'd*, 248 F.3d 1142 (5th Cir. 2001) (unpublished opinion), *cert. denied*, 534 U.S. 820, 122 S. Ct. 52, 151 L. Ed. 2d 22 (2001); *Coughlin v. Health Care Serv. Corp.*, 244 F. Supp. 2d 883, 885-89 (N.D. Ill. 2002); *Carducci v. Aetna U.S. Healthcare*, 204 F. Supp. 2d 796, 799-803 (D.N.J. 2002); *Franks v. Prudential Health Care Plan, Inc.*, 164 F. Supp. 2d 865, 868-69 (W.D.Tex. 2001)).

2. OHP has filed a subrogation enforcement action against Mr. Arana for the recovery of the money held by his attorney in (Cont'd)

an ERISA plan based on a saved state statute was subject to complete preemption under § 502(a)(1)(B), the court indicated that it would "decline to address OHP's argument that there is subject matter jurisdiction because OHP has a federal claim under [*Knudson*] and *Franchise Tax Board v. Construction Laborers Vacation Trust for So. Cal.*, 463 U.S. 1 (1983))." *Appendix of Julio Arana* at 13. The Fifth Circuit correctly determined that it had jurisdiction over the instant claim pursuant to ERISA § 502(a)(1)(B). It therefore never reached the *Knudson* question raised by OHP and never expressed an opinion on the ability of OHP to bring a *Knudson* action in federal court.

Although Mr. Arana now seeks to bring into the discussion the irrelevant issue of whether OHP would have a subrogation claim under 502(a)(3), he omits from his factual statement the one fact most relevant to that issue, that being the fact that Mr. Arana has escrowed $150,000 in his attorney's trust account pending the disposition of this case. Mr. Arana received $1,112,5000 in settlement proceeds from four insurers. *See Petition for Writ of Certiorari* at p. 4. When he obtained the $650,000 settlement from the last insurer with which he settled, Arana placed $150,000 of that money into his attorney's trust account pending the resolution of the instant suit. That money remains available and is sufficient to reimburse OHP for the medical expenses it has paid on Mr. Arana's behalf. Although OHP does not believe this fact relevant to the § 502(a)(1)(B) issue upon which the Fifth Circuit unanimously found jurisdiction, it gains

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(Cont'd)

escrow. That action, *OHP v. Arana*, No. 02-2765 (E.D. La.), has been stayed pending resolution of the issues now pending in the Fifth Circuit and before this Court on *certiorari*.

significance should the Court wish to analyze whether the § 502(a)(3) issues raised by Mr. Arana are truly worthy of the Court's attention.

REASONS FOR DENYING THE PETITION

In the instant matter, the Fifth Circuit correctly decided that Mr. Arana's claim for retention of the settlement proceeds paid to him constituted an action to clarify his rights to benefits under § 502(a)(1)(B). That those rights may tangentially involve issues of subrogation is of no matter, for the existence of § 502(a)(1)(B) jurisdiction over a claim for declaratory relief brought by a member against an ERISA plan cannot be defeated, simply because the plan could bring an action under § 502(a)(3) to defeat the rights sought to be clarified. Furthermore, although the Fifth Circuit did not reach the § 502(a)(3) issue raised by Mr. Arana in his *Petition for Certiorari*, even that issue as framed by Mr. Arana is consistent with this Court's prior holdings and provides no basis for review. Therefore, this Court should deny Mr. Arana's *Petition for Writ of Certiorari*.

I. THE FIFTH CIRCUIT'S DECISION THAT ERISA § 502(a)(1)(B) PROVIDES JURISDICTION OVER MR. ARANA'S CLAIM IS WELL-SUPPORTED AND DOES NOT PRESENT AN ISSUE WORTHY OF REVIEW VIA WRIT OF CERTIORARI.

Although Mr. Arana attempts to attract this Court's attention by framing his *Petition* as one involving a *Knudson*-style subrogation/reimbursement issue, the truth is that the potential existence of a *Knudson*-type claim on the part of OHP is unnecessary to the disposition of this case. The only question before this Court, as was the only question before

the *en banc* Fifth Circuit, is whether § 502(a)(1)(B) provides federal jurisdiction over a request for declaratory judgment seeking to invalidate an ERISA plan provision based on an arguably saved state statute. Because the Fifth Circuit correctly resolved this case using § 502(a)(1)(B), and that decision is consistent with prior precedent and with the ERISA statute, this Court has no reason to exercise its discretion to review the instant matter.

A. *The Fifth Circuit's decision is consistent with ERISA § 502(a)(1)(B).*

The instant action seeks a declaration that an arguably saved state law precludes OHP from enforcing a subrogation and reimbursement provision contained in its ERISA-governed Health Services Agreement with the employer of Mr. Arana's mother. Although Mr. Arana argues that such a claim involves solely issues of state law, such is not the case, for the application of the saved state statute to an ERISA plan necessarily implicates federal interests. *See generally, Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 52 (1987) ("The conclusion that § 502(a) was intended to be exclusive is supported, first, by the language and structure of the civil enforcement provisions.") The plain language of § 502(a)(1)(B) provides jurisdiction for declaratory actions seeking interpretations of ERISA benefit plans. Therefore, the Fifth Circuit correctly determined that federal jurisdiction existed over Mr. Arana's claims.

Although Mr. Arana correctly notes that statutory interpretation must begin with the plain language of the statute, *see Petition* at p. 7, he nevertheless ignores the plain language of § 502 to conclude that Congress failed to provide

for federal jurisdiction over declaratory actions like those at issue herein. ERISA 502(a) provides in relevant part that:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C. § 1132(a)(1)(B) and (a)(3). Congress clearly intended § 502(a)(1)(B) to apply to three types of actions—those "to recover benefits due under the terms of the plan", those "to enforce rights under the terms of the plan" and those "to clarify rights to future benefits under the terms of the plan." *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989) (noting that a plan member may

bring an action to "enforce rights under the terms of the plan"); *Heimann v. National Elevator Indus. Pension Fund*, 187 F.3d 493, 509 (5th Cir. 1999) ("The Heimanns' petition's allegation of facts also entitle them to bring a civil action for declaratory judgment to clarify and enforce their rights under the terms of the plan"); *Bublitz v. E.I. DuPont de Nemours & Co.*, 149 F. Supp. 2d 816, 824 (S.D. Iowa 2001) ("ERISA does allow participants and beneficiaries to bring declaratory judgment actions to clarify or enforce their rights"). The second type of relief is distinct from the first and third. It does not use the term benefits, it clearly applies to a broader set of rights under the plan, and it permits the enforcement of plan terms by reference to something outside of the four corners of the plan itself.

Although Mr. Arana attempts to interpret § 502(a) to mean that a claim under § 502(a)(1)(B) for a declaratory judgment as to subrogation/reimbursement rights is only cognizable where the plan would also have an action for subrogation under § 502(a)(3), that interpretation is untenable in light of the structure of the statute and the legislative intent underlying it. Congress created subsections (a)(1)(B) and (a)(3) to serve differing functions, with the latter serving as an expansion—rather than a contraction—of the remedies available under the former. Courts interpreting the function of § 502(a)(3) have recognized it as a "catch-all" provision intended to afford relief to plan members and fiduciaries that is not specifically encompassed by the prior sections. "Section 502(a)(3), which is essentially a catch-all remedial provision, authorizes a civil action by a participant 'to obtain other appropriate equitable relief (i) to redress such violations [of the terms of the plan] or (ii) to enforce any provisions of . . . the terms of the plan.'" *Santasania v. Union Trowel Trades Benefit Funds*, 2003 U.S. Dist. LEXIS 1503 at *7 (M.D. Pa.). *Accord Dobson v. Hartford Fin. Servs.*, 196

F. Supp. 2d 152, 168 (D. Conn. 2002) ("the catch-all provision of § 502(a)(3) may, under appropriate circumstances, permit an equitable remedy for such a violation of the Plan"); *Watson v. Deaconess Waltham Hosp.*, 141 F. Supp. 2d 145 (D. Mass. 2001) ("Thus, the language of ERISA § 502(a)(3) creates a 'catch-all' or 'safety net' that provides appropriate equitable relief to plaintiffs who cannot rely on ERISA's other enumerated causes of action.") This "safety net" permits any ERISA person to obtain "appropriate equitable relief" in accordance with the terms of the ERISA plan at issue. *Compare, e.g., Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19-20 (1983). It thus expands the scope of remedies available to an ERISA plaintiff beyond the remedies expressly delineated in the preceding enforcement provisions. To argue, as Mr. Arana does, that subsection (a)(3) acts as a check on actions for declaratory relief brought under subsection (a)(1)(B), is to ignore the fact that subsection (a)(3) *expands* rather than contracts the scope of available remedies under ERISA's civil enforcement scheme.

Equally untenable, and stretching the boundaries of procedure, is Mr. Arana's assertion that he brought the instant action "as a defense" and thus the well-pleaded complaint rule precludes federal jurisdiction. *See Petition for Certiorari* at pp. 7-9. To be exact, the well-pleaded complaint rule posits that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. A defense is not part of a plaintiff's properly pleaded statement of his or her claim." *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). The rule concerning the federal nature of defenses *does not* apply to a situation like the instant matter, in which a party has not asserted a defense in response to an action but has instead instituted

his own action for declaratory relief. Under those circumstances, the action is more properly analyzed under the standard set forth in *Franchise Tax Board*, in which the Court asks whether the coercive action the plaintiff seeks to bar via declaratory relief would itself give rise to federal jurisdiction. *See, e.g., id.* at 16 n.14. In the context of a claim under § 502(a)(1)(B), such a claim will always be federal in nature and will therefore be subject to removal jurisdiction.

That is so because a claim for declaratory relief brought under § 502(a)(1)(B) always arises out of a federal statute—*i.e.*, ERISA. Traditional declaratory judgment analysis holds that an action for relief under the Declaratory Judgments Act does not provide an independent basis for federal jurisdiction because that statute is purely procedural, and the Court cannot determine whether the declaratory relief sought is federal without reference to the federal statute underlying the request for declaratory relief. *See* 28 U.S.C. § 2201; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("The operation of the Declaratory Judgment Act is procedural only.") Yet § 502(a) provides both the remedy—declaratory relief—and the substantive law governing of any such claim for relief.

It is well-settled that a claim relates to an ERISA plan when it requires interpretation of a plan provision or otherwise "premises a cause of action on the existence of an ERISA plan." *Howard v. Coventry Health Care, of Iowa, Inc.* 293 F.3d 442, 445-446 (8th Cir. 2002). Equally well-settled is the principle that all claims relating to ERISA plans are subject to federal preemption and fall within the exclusive civil enforcement scheme of ERISA § 502(a). "The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's

civil enforcement remedies were intended to be exclusive." *Pilot Life*, 481 U.S. at 54. This statement means precisely what it says—the civil enforcement provisions of ERISA are exclusive, they are the only means by which a plan member may bring a claim for benefits or plan interpretation against an employer plan, and they do not depend for their exclusivity on the substantive basis of the claim asserted. *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144 (1990) ("Congress was well aware that the powerful pre-emptive force of § 301 of the LMRA displaced" all state-law claims, "even when the state action purported to authorize a remedy unavailable under the federal provision"); *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1132-33 (9th Cir. 1992). The fact that the substantive basis of the claim for benefits or for plan interpretation rests on an application of state law makes no difference in the exclusivity of the remedy. *See generally, Bullock v. Equitable Life Assur. Soc'y of the United States*, 259 F.3d 395, 410 (5th Cir. 2001); *Corporate Health Insurance, Inc. v. Texas Dept. of Insurance*, 215 F.3d 526, 539 (5th Cir. 2000); *Plumb v. Fluid, Inc.*, 124 F.3d 849, 860 (7th Cir. 1997); *Burgio & Campofelice, Inc. v. New York State DOL*, 107 F.3d 1000, 1010 (2nd Cir. 1997); *Crull v. Gem Ins. Co.*, 58 F.3d 1386, 1390-91 (9th Cir. 1995). Where a plan beneficiary seeks an interpretation of an ERISA plan, he necessarily states a claim "arising under" the ERISA statute, giving rise to federal question jurisdiction under § 502(a)(1)(B).[3] Therefore, a claim for declaratory relief under § 502(a)(1)(B) is necessarily one "arising under" the ERISA statute and is therefore subject to federal jurisdiction.

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3. *See, e.g., Chapter v. Monfort of Colorado, Inc.*, 20 F.3d 286, 287 (7th Cir. 1994); *Beecher v. Connecticut General Life Ins. Co.*, 2002 WL 31681473, *2 (N.D.Ill. 2002) ("Plaintiff's cause of action arises under the civil enforcement provision of ERISA, 29 U.S.C. § 1132(a)(1)(B) *et seq.*")

In the instant matter, Mr. Arana's claim that his declaratory action does not seek benefits because benefits have already been fully paid is but an attempt to wordsmith his way out of federal court. Mr. Arana explicitly stipulated in the district court that his action could be brought as an alternative claim for benefits under § 502(a). *See Appendix* of Julio Arana at p. 49 n.9. Indeed, Mr. Arana has based his entire lawsuit on a state statute which precludes insurers from any attempt to "reduce or exclude benefits" based on the existence of individually underwritten coverage. Whether Mr. Arana's interpretation of that statute is successful is of no moment to the question of whether his original action on its face states a claim for clarification of his rights under the benefits agreement with OHP. *See, e.g., Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 701 (7th Cir. 2003) ("When considering a motion to dismiss for lack of subject matter jurisdiction, a court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff.") Although the Fifth Circuit refused to decide whether Mr. Arana's claim was more properly characterized as one for benefits or one for clarification of rights, its decision emphasizes the flexible nature of those statutes and recognizes Mr. Arana's claim as one seeking an interpretation of his ERISA-governed benefits plan. In its ultimate conclusion, the lower court correctly recognized that "one could say that Arana seeks to enforce his rights under the terms of the plan, for he seeks to determine his entitlement to retain the benefits based on the terms of the plan." *Arana Appendix* at p. 9. That recognition of the true nature of Mr. Arana's claim is sufficient to confer subject matter jurisdiction over that claim in the federal courts.

Cutting through Mr. Arana's play on words and recognizing the essence of the relief he sought, the Fifth Circuit properly recognized his claim as one arising under § 502(a)(1)(B). Because that decision comports with the intent and plain language of the statute, there is no further need for review by this Court.

B. *The Fifth Circuit decision is consistent with prevailing precedent interpreting the effect of § 502(a)(1)(B).*

This Court has implicitly found that claims brought under saved state laws are nevertheless subject to § 502(a)(1)(B) where they seek the interpretation or enforcement of an ERISA plan term. In *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999), the plan member's ERISA-governed disability benefits agreement stipulated that all claims for benefits be filed within one year and one-hundred-eighty days of the onset of the disability. *Id.* at 364. Ward filed his claim for disability benefits late under the terms of the plan. *Id.* When UNUM sought to deny his claim, Ward argued that the time limitation was invalid under California's notice-prejudice rule, which required that a benefits plan show prejudice before denying a claim for untimeliness. *Id.* at 366. Finding the notice prejudice rule to be a saved state statute, this Court nevertheless held that the question of whether this saved state law nullified an ERISA plan provision was cognizable under 502(a)(1)(B). "Ward sued under § 502(a)(1)(B) 'to recover benefits due . . . under the terms of his plan.' The notice-prejudice rule supplied the relevant rule of decision for this § 502(a) suit." *Id.* at 377 (citing 29 U.S.C. § 1132(a)(1)(B)). *See also id.* at 377 n.7 ("Ward has sued under § 502(a)(1)(B) for benefits due, and seeks only the application of saved state insurance law as a relevant

rule of decision in his § 502(a) action"). The Fifth Circuit decision in the instant matter is nothing but an application of the *Ward* rule that a federal court has jurisdiction over an action to interpret an ERISA-governed health plan through application of a saved state statute.

Foreshadowing the result in *Ward*, and similarly supportive of the Fifth Circuit's unanimous *en banc* decision is *Plumb v. Fluid Pump Service, Inc.*, 124 F.3d 849 (7th Cir. 1997). In *Plumb*, an ERISA plan participant sued his health plan for reimbursement of medical bills incurred by his son, a beneficiary of the plan. *Id.* at 851. Starmark, the health benefits provider for the Fluid Pump Service health plan, defended the claim on the grounds that the condition pre-existed its coverage of the participant's son and was therefore not covered under the terms of the plan. *Id.* at 853-854. The participant countered by arguing that any such provision violated an Illinois state insurance law requiring benefits providers to cover conditions for which coverage existed under a prior health benefits plan. *Id.* at 854. Finding that the Illinois statute was in fact saved from conflict preemption under ERISA, but nevertheless holding that its application to an ERISA-governed benefits plan constituted an action under ERISA § 502(a)(1)(B), the Seventh Circuit held as follows:

> In this case, we are asked to examine the combined effect of *Metropolitan* and *Pilot Life*. We begin with a point of agreement: Under *Metropolitan*, the state statute cited by Mr. Plumb and Fluid, 215 ILCS § 95/20, is not preempted by ERISA. That section does not provide a remedy, and even if it did, the remedy would be preempted by ERISA under *Pilot Life*. Mr. Plumb, however,

prayed for an ERISA remedy in his complaint: the "benefits rightfully due and owing under the P[lan]" and for costs under ERISA § 502(g), 29 U.S.C. § 1132(g). Nonetheless, Time maintains, and the district court agreed, that Mr. Plumb's claim conflicts with ERISA's remedial scheme and is preempted by ERISA. In their view, 215 ILCS § 95 20 cannot be enforced in a suit by a beneficiary to recover benefits; rather, the statute can be enforced only by the State of Illinois to impose a fine on Time or to deny it a license. We believe, however, that the district court and Time's characterization misapprehends the interaction of *Metropolitan* and *Pilot Life*.

Section 502(a)(1)(B) provides that a participant may bring a civil action "to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). The appropriate remedy under § 502(a)(1)(B) in this case therefore turns on the answer to the following question: What are the terms of the Time plan? The most obvious are those that are written in Time's insurance policy. In addition, contrary to Time's view, § 95 20 also becomes a term of its insurance policies. By its plain wording, § 95/20 writes a provision into all Illinois insurance policies that any "preexisting condition limitation period shall be reduced" if certain criteria are met. 215 ILCS § 95/20. It is fundamental insurance law that "existing and valid statutory provisions enter into and form a part of all contracts of insurance to

which they are applicable, and, together with settled judicial constructions thereof, become a part of the contract as much as if they were actually incorporated therein." 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 19:1, at 19-2 to 19-4 (1996) (footnotes omitted). Policy terms that are in conflict with statutory provisions are invalid. *Id.* § 19:2, at 19-5 to 19-8; *cf.* 2 E. Allan Farnsworth, Farnsworth on Contracts § 5.1, at 2; *id.* § 5.8, at 68-75 (1990). This principle is part of the law of Illinois. *See, e.g.*, *American Country Ins. Co. v. Wilcoxon*, 127 Ill.2d 230, 130 Ill. Dec. 217, 222, 537 N.E.2d 284, 289 (1989); *Harris v. St. Paul Fire & Marine Ins. Co.*, 248 Ill. App.3d 52, 187 Ill. Dec. 739, 742, 618 N.E.2d 330, 333 (1993); *Johnson v. American Family Mut. Ins. Co.*, 193 Ill. App.3d 794, 140 Ill. Dec. 783, 788, 550 N.E.2d 668, 673 (1990). Likewise, this court, in an ERISA case predating *Pilot Life*, held that an Indiana insurance code provision was not preempted by ERISA and imputed the provision into an insurance policy that did not contain it. *See Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 700 (7th Cir. 1977), cited in *Metropolitan*, 471 U.S. at 742 n.18, 105 S. Ct. at 2390 n.18. Indeed, *Metropolitan* itself, although not involving a suit for benefits, seems to assume that mandated-benefit laws would affect the substantive terms of insurance policies by operation of law. *See* 471 U.S. at 740-47, 105 S. Ct. at 2389-93; *see also FMC Corp. v. Holliday*, 498 U.S. 52, 61, 111 S. Ct. 403, 409, 112 L. Ed. 2d 356 (1990) ("The ERISA plan is consequently bound by state insurance regulations insofar as

> they apply to the plan's insurer."); *id.* at 64, 111 S. Ct. at 411 ("[I]f a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts. . . ."). Section 95/20 therefore becomes a substantive term in all Illinois insurance policies, and § 502(a)(1)(B) of ERISA allows Mr. Plumb to sue to recover the benefits due under those terms. Our colleagues in other circuits have recognized that § 502(a)(1)(B) allows participants to recover benefits under ERISA plan terms as modified by non-preempted state insurance laws. *See Williams v. UNUM Life Ins. Co.*, 113 F.3d 1108, 1113 (9th Cir. 1997) (stating that, on remand, the district court should determine whether insurance policy is in compliance with non-preempted insurance law; "[i]f not, the terms of [the insurance code section] must be read into the UNUM policy"); *Ruble v. UNUM Life Ins. Co.*, 913 F.2d 295, 297 (6th Cir. 1990).

Id. at 860-61 (7th Cir. 1997). *Accord Fink v. Dakotacare*, 324 F.3d 685, 689 (8th Cir. 2003) ("a substantive state insurance law, [] if saved will provide 'a relevant rule of decision' in an ERISA civil enforcement action"); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 289 (4th Cir. 2003) ("State law preserved as a regulation of insurance under § 514(b)(2)(A) may supply a substantive term or mandate a benefit in an employee benefit plan, but once that term or benefit becomes part of the plan, a suit to enforce it may only be brought under § 502(a)"); *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program*, 222 F.3d 643, 648 n.4 (9th Cir. 2000) (noting that "the contractual

provisions [required by saved state statutes] to be included in the policy govern the relationship of the parties" and may serve as the basis for a § 502(a)(1)(B) action); *Dang v. UNUM Life Ins. Co. of America*, 175 F.3d 1186, 1187 (10th Cir. 1999) (applying Oklahoma's notice prejudice rule to a claim brought "under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132.") Again, each and every one of these intermediate appellate decisions recognize that a plan member bringing a claim to interpret ERISA plan terms—even where the interpretation derives from the application of a saved state law—necessarily states a claim under ERISA 502(a)(1)(B). Although Mr. Arana has alleged that the Fifth Circuit decision is inconsistent with prevailing precedent, he has not cited to a single case on point, and has not even acknowledged this substantial appellate precedent in harmony with the Fifth Circuit holding.

This Court's denial of certiorari in the virtually identical case of *Clancy v. Employers Health Ins. Co.*, 534 U.S. 820 (U.S. 2001), dispels any lingering doubt about whether the instant matter merits further review. *Clancy* involved facts identical to the instant case—a plan member sought to invalidate subrogation and reimbursement provisions contained in the member's benefit plan on the ground that La. R.S. 22:663 precluded enforcement of such provisions. *See Clancy v. Employers Health Ins. Co.*, 82 F. Supp. 2d 589, 595 (E.D. La. 1999) ("Ms. Clancy seeks to recover benefits and to obtain a declaration that EHIC is not entitled to reimbursement; these claims are premised on Louisiana Revised Statute 22:663.") In that case, like this one, the district court found jurisdiction over Clancy's claims.

The Fifth Circuit affirmed this holding in an unreported *per curiam* opinion issued on February 1, 2001. *See Clancy v. Employers Health Ins. Co.*, 248 F.3d 1142 (5th Cir. 2001) (per curiam). **This Court denied *certiorari* in *Clancy* on October 1, 2001.** The issues presented in *Clancy* are identical to those at issue in the present case and the resolution of the jurisdictional questions in both *Clancy* and *Arana* are likewise identical. Just as *Clancy* presented no issues worthy of this Court's review, neither does the instant matter.

II. ANALYSIS UNDER § 502(a)(3) OF ERISA LIKEWISE AFFORDS NO BASIS FOR REVIEW.

Although the Fifth Circuit expressly pretermitted the issue of whether OHP could validly assert a subrogation claim under § 502(a)(3), Mr. Arana attempts to bring that provision into his *Petition* by arguing that § 502(a)(1)(B) jurisdiction is only appropriate if OHP could have validly brought a subrogation claim under § 502(a)(3). Such analysis fails when one recognizes that the question whether OHP could have brought an action under § 502(a)(3) cannot impact validly-established jurisdiction based on § 502(a)(1)(B). Should the Court treat this as a *Knudson* case, however, the Court will find federal jurisdiction equally appropriate. Because Mr. Arana has escrowed $150,000 of identifiable funds against which OHP can subrogate, OHP could validly bring such a subrogation action under *Knudson*, and the Fifth Circuit's finding of jurisdiction over such an action would remain valid.

A. *The instant case falls squarely within the type of situation for which Knudson found federal jurisdiction.*

Knudson confined its holding to the situation before it—one in which the funds at issue were not in the possession of the plan member and the plan sought to impose personal liability against the member. *Knudson*, 122 S. Ct. at 712-13. In *Knudson*, the plaintiff was a beneficiary of the self-funded ERISA plan maintained by Earth Systems, Inc. *Id.* at 711. She was rendered a quadriplegic in an automobile accident and sustained medical expenses in the amount of $411,157.11, of which Earth Systems paid $75,000 and its re-insurer Great-Western paid the remainder.[4] *Id.* Mrs. Knudson ultimately sued the tortfeasor who caused her injuries and obtained a $650,000 settlement, of which some $256,000 was disbursed to a special needs trust for her benefit and the remainder to her attorney, "who, in turn, would tender checks to Medi-Cal and Great-West." *Id.* at 207-208. Thus the money at issue in *Knudson* was entirely disbursed as of the time of the lawsuit. The Court noted that the suit in question sought "to enforce the reimbursement provision of the Plan by requiring the Knudsons to pay the Plan $411,157.11 of any proceeds recovered from third parties." *Id.* at 712. Consequently, the dissipation of the funds at issue left no identifiable *res*, but instead rendered the action solely one *in personam* to enforce the subrogation and reimbursement provisions of the Earth Systems plan.

Based on these facts, this Court began with the proposition that "§ 502(a)(3), by its terms, only allows for

4. Great-Western ultimately obtained an assignment of Earth Systems' subrogation rights for the amounts Great-Western had paid. *Knudson*, 122 S. Ct. at 713.

equitable relief." *Knudson*, 122 S. Ct. at 718 (emphasis in original). Listing exemplars of the type of remedies available under that rubric, the Court noted that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 714. The Court distinguished the action before it from this form of equitable relief on the grounds that no specific funds were at issue and the plaintiff failed to trace any identifiable *res* into the possession of the defendant. "Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 714-715. Through this statement, the Court left open the possibility that an action for constructive trust could lie in federal court where an ERISA plan could identify "money or property" over which it could impose a constructive trust.

In the instant matter, Mr. Arana has placed $150,000 in escrow with his attorney pending the outcome of this litigation. That money constitutes an identifiable *res* that OHP can seize if it can show that the money properly belongs to it. Because those funds cover the amount expended by OHP to pay Mr. Arana's medical bills, that fund is sufficient to satisfy any claim for subrogation or reimbursement that OHP might have, and thus OHP will not have to seek a judgment *in personam* against Mr. Arana for the payment of any deficiency. Finally, because OHP has a clear and unambiguous plan provision permitting it to subrogate to or seek reimbursement from the settlement proceeds of its members—and because permitting Mr. Arana to retain those proceeds would doubly compensate him for the medical

expenses incurred in treating his injuries—equity demands that Mr. Arana surrender those proceeds. Based on these facts, the instant case fits squarely within that range of cases for which *Knudson* left the door of the federal courts open, and any finding that jurisdiction exists over OHP's claims would be consistent with the *Knudson* holding.

B. *Arana's attempts to find precedent inconsistent with OHP's assertion of its subrogation rights are unavailing.*

Because the Fifth Circuit never addressed the issue of § 502(a)(3) jurisdiction, and indeed eschewed any attempt to do so, it seems odd that Mr. Arana would claim that the lower court's finding of jurisdiction is somehow inconsistent with cases interpreting § 502(a)(3). The cases cited by Mr. Arana in support of his § 502(a)(3) position are either outdated or inconsistent with *Knudson*, and thus present no basis for this Court's exercise of jurisdiction in the instant case.

Mr. Arana's citation to the Ninth Circuit decision in *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), does not change the *Knudson* analysis, for *Westaff* was filed before the Supreme Court decided *Knudson* and Westaff's attorneys only sought declaratory relief and specific performance. Westaff did not seek restitution in the form of a constructive trust. In *Westaff*, the plan member settled a personal injury claim for $15,000 and then placed that money in escrow pending an action for declaratory judgment to adjudicate the validity of the plan's liens. *Id.* at 1166. The court recognized that the case before it

> differs from our prior cases only in that the money at issue, a legitimate personal injury settlement to which the beneficiary is entitled, has been

> placed in an escrow account and remains specifically identifiable. The action remains one for money damages. The district court correctly recognized this and dismissed the case for failure to state a claim.

Id. at 1167. Yet the court reached that decision based solely on its reasonsing that any action to obtain settlement proceeds from a plan member would by definition constitute an action at law. *Knudson* specifically rejected this reasoning when it stated that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Knudson*, 122 S. Ct. at 714 (emphasis added).

Further, the Court should find no basis for granting *certiorari* based on Mr. Arana's citation to *Primax Recoveries, Inc. v. Sevilla,* 324 F.3d 544 (7th Cir. 2003). *Sevilla* expressly approved the imposition of a constructive trust on funds held by a plan member, refusing to impose such a trust in the case before it only because "the fund remains in the hands of the insurer, who is not a defendant. You can impose a constructive trust only on a defendant, *Jones v. Felix,* 372 Ill. 262, 23 N.E.2d 706, 708-09 (1939), or someone in privity with the defendant." *Sevilla*, 324 F.3d at 548 (7th Cir. 2003). The insurer in the instant matter who settled with Mr. Arana has already paid out the settlement funds to Mr. Arana and Mr. Arana has escrowed them, distinguishing this matter from *Sevilla* and drawing it parallel to the situation in which *Knudson* permits the imposition of a constructive trust. *Sevilla* does not conflict in any way with the potential imposition of a constructive trust in the instant matter.

Finally, Arana's citation to *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997), provides no support for his position, as the Seventh Circuit has essentially abrogated the rule promulgated by *Blackburn* in *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003). In *Blackburn* and *Varco*, the issue presented to the court was whether the Illinois common fund doctrine precluded an ERISA plan from obtaining subrogation without the necessity of paying attorneys' fees to the member's attorney. *See Varco*, 338 F.3d at 683; *Blackburn*, 115 F.3d at 494. In *Varco*, the Seventh Circuit analyzed the issue of whether the plan could abrogate the common fund doctrine by looking solely to the post-*Knudson* criteria for imposing a constructive trust, finding that the plan's attempt to enforce the provision in its benefits agreement allowing subrogation was cognizable in federal court:

> Thus, under *Great-West Life,* the reimbursement action by the Committee in this unique case is equitable because the funds the Committee seeks to recover are identifiable, are in the control of a defendant, and the Committee is rightfully entitled to the monies under the terms of the Plan. Because those elements are met here, the Committee's claim is equitable under § 502(a)(3)(B) of ERISA, and the district court properly exercised federal question subject matter jurisdiction under 28 U.S.C. § 1331.

Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco, 338 F.3d 680, 688 (7th Cir. 2003). The difference between *Blackburn* and *Varco* is clear—where a plan provides for a specific recovery

through subrogation, an action to obtain that recovery "arises under the plan" and fits within ERISA's civil enforcement scheme if it fits the *Knudson* criteria. Because any recovery through subrogation by OHP would derive from its plan-based right to do so, and its subrogation action would fit squarely within the *Knudson* criteria, the exercise of federal jurisdiction over such an action would conflict with neither *Blackburn* nor *Sevilla*.

In the instant matter, it is undisputed that Mr. Arana had his attorney hold in escrow an amount equivalent to the funds claimed by OHP in restitution, and then commenced the instant action to adjudicate the entitlement of OHP to those settlement funds.[5] Thus Mr. Arana's request for declaratory relief encompasses more than the simple question of whether OHP may enforce its subrogation and reimbursement provisions against Mr. Arana singly. It also inquires whether OHP may enforce its subrogation provisions through an action for constructive trust against those escrowed funds. Under these circumstances, the greater necessarily encompasses the lesser, and "the facts alleged, under all the

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5. Whether those funds were in escrow at the time the action commenced is of no moment to this Court's analysis. It is undisputed that at the current time, and at the time the district court rendered its decision, the funds were being held in the attorney's trust account for the benefit of Mr. Arana. So long as a basis for jurisdiction exists at the time of the Court's decision, any prior jurisdictional flaws are *ex post facto* "cured." *See, e.g., Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702 (1972); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001); *H & D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 328 (5th Cir. 2000). Jurisdiction necessarily exists over this matter at the current time and that is the only concern this Court should have. Moreover, Arana's original declatory action.

circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Mr. Arana's pleadings necessarily disclose the existence in part of a controversy arising out of the attempt by OHP to impose a constructive trust as a means by which to enforce its subrogation rights. Because this case mirrors that which *Knudson* found would give rise to federal question subject matter jurisdiction under § 502(a)(3), any finding of jurisdiction over the instant matter is appropriate, and there exists no reason for the Court to review the Fifth Circuit's holding in this matter.

Because the Fifth Circuit expressly refused to discuss the issue of whether OHP could bring an action for subrogation against Mr. Arana under ERISA § 502(a)(3) and *Knudson*, Mr. Arana's claim that the finding of jurisdiction in the instant case "conflicts" with *Knudson* is spurious. Yet Mr. Arana would be no better off had the lower court addressed the 502(a)(3) issue, for a finding of jurisdiction under that statute would represent nothing more than a consistent and correct application of the *Knudson* criteria to the facts of the instant case. Regardless of the argumentative straw at which Mr. Arana grasps, he cannot elude the expansive grasp of ERISA jurisdiction. Like his § 502(a)(1)(B) argument, his § 502(a)(3) argument provides no basis for this Court to grant a writ of certiorari to review the Fifth Circuit's holding.

CONCLUSION

For the foregoing reasons, Ochsner Health Plan, Inc. respectfully moves this Court to deny the *Petition for Writ of Certiorari* filed in this matter by Julio Arana.

Respectfully submitted,

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